**STATE OF ILLINOIS**
**ILLINOIS COMMERCE COMMISSION**

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| McLeodUSA Telecommunications Services, Inc. | ) | |
| | ) | |
| Petition for Arbitration of Interconnection Rates | ) | |
| Terms and Conditions and Related Arrangements | ) | 01-0623 |
| with Illinois Bell Telephone Company (Ameritech | ) | |
| Illinois) pursuant to Section 252(b) of the | ) | |
| Telecommunications Act of 1996. | ) | |

# REPLY BRIEF OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

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The Staff of the Illinois Commerce Commission ("the Staff"), by and through its counsel, and pursuant to Section 761.400 of the Commission's Rules of Practice (83 Ill. Adm. Code 761.400), respectfully submits its Reply Brief the above-captioned matter.

**Issue 15 -- Should the Interconnection Agreement limit the parties liability for any loss relating to or arising out of providing services under the agreement?**

The Staff did not address this issue in its testimony, or its Initial Brief. *See, generally,* Staff Ex. 1.0, 2.0, Staff Initial Brief (hereafter "IB"). However, on December 5, 2001, the Administrative Law Judges issued the following direction: "If either party (or staff) is aware of specific Commission precedent regarding Issue 15 (or other issues) please bring it to our attention in your reply briefs." In compliance with this directive, the Staff offers the following.

First, the Staff is unaware of this specific issue having been litigated previously before the Commission. The matter certainly would be difficult to raise in any context other than that of arbitration of an interconnection agreement, and Staff does not believe that it has previously been raised in that context.

Second, the Staff observes that Ameritech, in its Initial Brief, refers the Commission to In re Illinois Bell Switching Litigation, 161 Ill.2d 233, 641 N.E.2d 440 (1994), which Ameritech cites for the proposition that a regulated company's ability to provide service to customers at affordable rates is dependent upon legal limitations being placed upon its liability for interruption of service. *See* Ameritech IB at 20.

The Staff is of the opinion that In re Illinois Bell Switching Litigation may not be entirely apposite for any of several reasons. First, the Illinois Bell Switching Litigation case sounded in tort, while this matter is a contract arbitration. Second, in his concurring opinion in Illinois Bell Switching Litigation, Justice Miller identified several rationales that support enforcement of liability limitations in public utility tariffs. Illinois Bell Switching Litigation, 161 Ill.2d at 249 *et seq.* In essence, Justice Miller's rationale for enforcing liability limitations was based upon the fact that, to the extent Illinois Bell was compelled to pay substantial judgments for service interruptions, its customers would ultimately bear the cost of those judgments in the form of higher rates, given the fact that Illinois Bell was then subject to rate-of-return regulation. 161 Ill.2d at 250. However, as Justice Miller further noted, "[c]hanges are coming to the world of telecommunications[, such as] … different models of ratemaking and regulation." 161 Ill.2d at 253. In support of this proposition, Justice Miller specifically cited Section 13-506.1 of the Act, authorizing the Commission to adopt alternative regulation, see 220 ILCS 5/13-506.1, and noted that "[t]he traditional justifications for enforcing liability limitations … may lose strength as these changes occur." 161 Ill.2d at 253.

Justice Miller was, as it happens, correct to a degree. Illinois Bell, having changed its business identity to Ameritech, petitioned for, and received, alternative regulatory treatment from the Commission. *See* Illinois Bell Telephone Company: Petition to Regulate Rates and Charges of Noncompetitive Services under an Alternative Form of Regulation / Citizens Utility Board v. Illinois Bell

Telephone Company: Complaint for an investigation and reduction of Illinois Bell Telephone Company's rates under Article IX of the Public Utilities Act, *Order*, ICC Docket 92-0448/93-0239 (consol.) (October 11, 1994) (hereafter "Alt Reg Order"). In fact, in the *Alt Reg Order*, Ameritech sought, and obtained, price cap regulation, which means that its rates are regulated, rather than its earnings, as was the case under rate-of-return regulation. Alt Reg Order at 20 *et seq*. This, of course, means that Ameritech's ratepayers will not suffer if it is compelled to pay substantial judgments for negligence; instead, its shareholders now bear that risk. Accordingly, the Illinois Bell Switching Litigation doctrine has lost much, if not all, of its force.

This is not to suggest that McLeod should necessarily prevail. As Justice Miller noted, a party can insure itself against the risk of service interruptions. 161 Ill.2d at 250. The Staff has no knowledge regarding the availability of, or costs associated with, such insurance.

The Staff specifically makes no recommendation regarding this issue.

**Issue 25 -- Should loop qualification information be made available as part of Ameritech's OSS at no charge, and does Ameritech provide different loop qualification information depending on the method by which the information is accessed?**

Ameritech argues, generally, that it incurs costs in providing manual loop qualification and should be allowed to recover them. Ameritech IB at 24 *et seq*. Ameritech contends that the Commission's *Order* and *Order on Rehearing* in Docket No. 00-0393, in which the Commission twice denied Ameritech recovery of manual loop qualification charges, do not preclude recovery of these costs, because in this proceeding, Ameritech has, in its words, "filled the gaps that led the Commission to that decision." Ameritech IB at 25. This, however, is simply not the case.

Ameritech appears to believe that there are "gaps," either evidentiary or logical, the filling of which will permit it to recover manual loop qualification charges. The Commission, however, left no gaps. It never concluded that Ameritech failed to support a manual loop qualification charge. What the Commission in fact concluded was that "loop information should have been accumulated in an Ameritech-IL databases [sic] long before now and, therefore, **manual processing costs are not appropriate**." Line Sharing Order at 84 (emphasis added). The Commission further concluded, on rehearing "Ameritech's loop information is available in a mechanized format, **so its argument that it needs a manual loop qualification for information in a non-mechanized format is irrelevant.**" Line Sharing Rehearing Order at 45 (emphasis added).

The Commission's holdings in these proceedings are consistent with the utilization of a forward-looking cost methodology, which is based upon what a well-run company, using the best available technology would do to maintain loop qualification information, rather than what Ameritech, or any other ILEC, does. If, by way of example, Ameritech kept all of its loop qualification information in large, dusty handwritten ledgers located in the basement of a very old facility[1], no one doubts that it would *incur* substantial costs in determining whether an individual

[1] Persons familiar with the Cook County Recorder's office will have no difficulty envisioning such an establishment.

loop could support xDSL services. However, its failure to transfer this information to something resembling a modern data retrieval system would prevent it from *recovering* those costs in the form of charges to CLECs, who, after all, should not be responsible for Ameritech's deplorable, if in this case entirely hypothetical, data management decisions. This is the basic principle of forward-looking costs.

Ameritech argues that it has demonstrated that, even though all of its loop qualification information has finally found its way to mechanized databases, it still incurs certain costs in conducting a manual loop qualification inquiry, because Ameritech employees must undertake certain work steps to determine which of two computer databases the proper information resides in. Ameritech IB at 30-31, *citing* Ameritech Ex. 5.0 at 10. This, however, is not relevant. This Commission, as noted above, has found that this information should be available mechanically, and that no manual charge is proper. Line Sharing Order at 84; Line Sharing Rehearing Order at 45. In essence, the Commission has found that the fact that Ameritech's databases are configured in a manner that requires manual intervention to retrieve loop qualification information is not a compelling reason to make CLECs pay manual loop qualification rates. There is, again, no reason to revisit this issue.

Moreover, it is clear that, even if there are indeed "gaps" in Ameritech's previous evidentiary presentations, Ameritech has not "filled" them in this one. As Ameritech witness Mark Welch candidly conceded, Ameritech's cost study is the one it submitted, in support of the same charges, calculated in the same way, as the one that it submitted in the rehearing in Docket No. 00-0393, and which the

Commission rejected. Tr. at 142, 147; *see also* Ameritech Ex. 7P at 5 (referring to attached TELRIC Non-recurring Cost Study); Line Sharing Rehearing Order at 45. Thus, Ameritech has given the Commission no reason to alter its previous two decisions denying Ameritech a manual qualification charge.

Ameritech argues that the FCC has a policy of permitting the imposition of such charges by ILECs. *See* Ameritech IB at 29, n.3; 30-32. To the Staff's knowledge, however, the FCC has not – as this Commission has – reviewed Ameritech's practices in Illinois. The Commission has spoken to this issue more than once, determining that Ameritech is not entitled to recover manual loop qualification charges. Ameritech has advanced no principled reason to revisit this decision. Accordingly, the Staff recommends that the Commission approve a rate of $0 for manual loop qualification.

**Issue 54 -- Does Ameritech have to provide power cabling as part of its obligation to provide physical collocation?**

**Issue 80 -- Does Ameritech have to provide power cabling as part of its obligation to provide virtual collocation?**

Ameritech argues that McLeod should be required to provide its own power cabling, using an Ameritech-approved vendor. Ameritech IB at 37 *et seq*.; 64 *et seq*. Ameritech contends that this should be the case whether McLeod is physically or virtually collocated at Ameritech central offices. Id. Ameritech asserts that McLeod will not be harmed, and indeed will realize certain benefits from being able o contract for its own power cabling. Id.

McLeod argues that Ameritech, rather than McLeod should be required to provide power cabling. McLeod IB at 21 *et seq*. McLeod contends that this obligation is part and parcel with Ameritech's obligation to turn over "functional collocation space" to McLeod. Id.

The Staff has, in its usual Solomonic manner, recommended that McLeod be required to provide cabling where it is physically collocated, and that Ameritech be required to provide cabling to virtually collocated McLeod equipment. Staff IB at 9 *et seq*. Neither party raises any argument which was not addressed in the Staff's Initial Brief, and the Staff stands on the arguments set forth in its Initial Brief as though fully reiterated herein.

**Issue 60 -- Should the agreement require that "functional" collocation space be turned over to MCLEOD at the end of the delivery interval?**

This issue appears to have reduced itself to identification of a definition of the word "functional" that is suitable under the circumstances. Ameritech advances a definition that reads as follows:

> **Functional space –** Space is functional when SBC-Ameritech has completed construction and provisioning of the collocation area in accordance with the requesting carrier's application and the space is available to be turned over to the carrier.
>
> Ameritech Ex. 4.1 at 2
>
> McLeod relies on the FCC requirement that:
>
> To complete provisioning of a collocation arrangement, an incumbent LEC must finish construction in accordance with the requesting carrier's application and turn functional space over to the requesting carrier.
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> McLeod IB at 27, *citing* Collocation Reconsideration Order, ¶ 30.

These submissions fail to connect with one another in significant ways. As McLeod notes in its Initial Brief, and as the Staff noted in *its* Initial Brief, the FCC requirement has, if common grammatical rules are applied, two components: (1) completion of construction in accordance with the requesting carrier's application; and (2) turning functional space over to the requesting carrier. *See* Staff IB at 19, McLeod IB at 28; *see also*, Collocation Reconsideration Order, ¶ 30. This, however, gets no one any closer to, if the Judges will excuse Staff counsel, a functional definition of "functional."

Since the FCC gives, as is so frequently the case, no aid whatever in determining what "functional" might mean, resorting to the dictionary presents an attractive solution to the problem, as well as one fully consistent with the established rules of statutory construction. *See, e.g.*, People v. Johnson, 231 Ill.App. 3d 412, 595 N.E.2d 1381(2nd Dist 1992) (words used in a statute generally should be construed in accordance with their ordinary and common meaning). The ordinary and common meaning of "functional" is, as the Staff noted in its initial Brief, "capable of performing; operative [as in] *a functional set of brakes.*" Staff IB at 20, *citing* American Heritage Dictionary of the English Language (4th Ed).The Staff recommends that the Commission adopt this definition.

**Issue 76 -- Should the Agreement contain a process for setting prices for any UNEs for which prices have not been otherwise agreed?**

Ameritech has proposed a contract provision which is quite similar to the Staff's, but with one significant difference[2]. Staff proposes that the provision read:

> Whenever CLEC requests to purchase a particular SBC-13STATE Unbundled Network Element for which no Unbundled Network Element price has been established or agreed by the Parties, AM-IL will provide a price quote for the UNE, consistent with the Act, within ten (10) days following AM-IL's receipt of CLEC's request. If the Parties have not agreed on a price for the UNE within ten (10) days following CLEC's receipt of the price quote, either Party may submit the matter for Dispute Resolution as provided for in the General Terms and Conditions of this Agreement. Provided, however, that nothing in this section 5.2.13 expands, contracts or otherwise alters the scope of AM-IL's duty to provide access to network elements to CLEC.

Staff IB at 24-5.

Ameritech's proposal reads:

> Whenever CLEC requests to purchase a particular SBC-13STATE Unbundled Network Element that exists at the time when the request is made but for which no Unbundled Network Element price has been established or agreed by the Parties, SCB-13STATE will provide a price quote for the UNE, consistent with the Act, within ten (10) days following SBC-13STATE's receipt of CLEC's request. If the parties have not agreed on a price for the UNE within ten (10) days following CLEC's receipt of the price quote, either Party may submit the matter for Dispute Resolution as provided for in the General Terms and Conditions of this Agreement. Provided, however, that nothing in this section 5.2.13 expands, contracts or otherwise alters the scope of SBC-13STATE's duty to provide access to network elements to CLEC.

Ameritech IB at 60.

Ameritech has indicated that it "hopes Staff will indicate the language Ameritech is now proposing is acceptable[,]" courteously pointing out that "[a]t the same time, however, it appears that there does remain a disagreement between Staff and Ameritech Illinois that may lead Staff to indicate otherwise." Ameritech IB at 62. Regrettably, the Staff does not find itself in a position to accept Ameritech proposal, with respect to existing UNEs[3].

Ameritech's proposal is based upon its contention – entirely correct – that the FCC and this Commission are both authorized to require the unbundling of network elements found to have satisfied the UNE Remand Order test for unbundling, and can therefore order an ILEC to unbundled an element on, for example, April 15 of a given year, when the ILEC had no obligation to unbundled the same element on April 14 of the same year. *See* Ameritech IB at 62-3. Consequently, Ameritech argues, it is placed in an onerous and unfair position if, on April 14, it has 120 days to quote a price – as it would under the BFR process – and the next day, it would have only ten days to do so, under the interconnection agreement as proposed by the Staff. Id. Ameritech therefore urges the Commission to adopt its proposed provision.

In advancing this proposal, Ameritech gives itself a great deal less credit for acumen in planning than the Staff gives it. As Staff witness Torsten Clausen noted during cross-examination, "[that] a network element …will be unbundled by the State Commission or the FCC will [not] come as an overnight surprise to the ILEC." Tr. at 168. This is evident from both the federal and state proceedings in which network elements have been ordered unbundled, which have, as a general

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[2] The Staff understands that McLeod finds the Staff's proposal acceptable. McLeod IB at 42.

[3] With this *caveat*, the Staff considers the remainder of Ameritech's proposal to be perfectly acceptable, should the Commission decline to adopt Staff's provision.

matter, taken a considerable length of time to complete. For example, in the *UNE Remand Order*, issued on November 5, 1999, the FCC ordered the unbundling of network elements that it had, in some cases, *first* ordered unbundled in August of 1996. *See* Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, *First Report and Order*, 11 FCC Rcd 15499, 15509*,* ¶ 12 (1996) (Local Competition First Report and Order), *aff'd in part and vacated in part sub nom.*, Competitive Telecommunications Ass'n v. FCC*,* 117 F.3d 1068 (8th Cir. 1997) (CompTel v. FCC) and Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997) (Iowa Utils. Bd. v. FCC), *aff'd in part and remanded*, AT&T v. Iowa Utils. Bd., 525 US 366, 119 S. Ct. 721 (1999)*; Order on Reconsideration,* 11 FCC Rcd 13042 (1996), *Second Order on Reconsideration*, 11 FCC Rcd 19738 (1996), *Third Order on Reconsideration and Further Notice of Proposed Rulemaking,* 12 FCC Rcd 12460 (1997). This procedural history vindicates Mr. Clausen faith that Ameritech will have sufficient notice of the possible unbundling of, and find sufficient time to determine what it costs to offer, a new UNE. Under these circumstances, Mr. Clausen offers his opinion that a prudent ILEC might well use such an intervening period to cost out the UNE in question, on the chance that it might be unbundled. Tr. at 168.

Certainly, as the Staff concedes, Tr. at 168-69, an ILEC is under no obligation to establish a price for a UNE it does not yet offer. However, to the extent that such unbundling appears likely, or even possible, it appears that a prudently run business like Ameritech would scarcely refrain from doing so.

Accordingly, the Staff submits that Ameritech's concerns about being blind-sided by the declaration of a new UNE should be discounted.

The Staff notes that Section 13-801(j) provides, in relevant part, that an ILEC "shall deliver the requested schedule of rates [for UNEs] to the requesting telecommunications carrier within 2 business days for 95% of the requests for each requesting carrier." 220 ILCS 5/13-801(j). Accordingly, the Staff essentially proposes – and McLeod is apparently prepared to accept – some *relaxation* of Ameritech's statutory duty to provide UNE prices.

The Staff recommends, therefore, that the Commission adopt the interconnection provision that it proposed in its Initial Brief.

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

Respectfully Submitted,

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